The defendant in a criminal case is under no obligation to become a witness, and his failure to take the stand does not create any presumption against him. Act of March 16, 1878; 20 St. at L. 30, chap. 37; Comp. St. 1913, sec. 1465. Whether the defendant's failure to testify as to material matters, having taken the stand, is ground for comment by the court, and the subject of inference by the jury, is a disputed point, hitherto undecided by the Supreme Court. The cases in that court in which the question has been argued have involved the subsidiary question of the right of cross-examination under the federal rule, and have been disposed of either upon the ground that the limit to the right of cross-examination was not exceeded, *Fitzpatrick v. United States* (1900) 178 U. S. 304; or, if exceeded, the answers given were not prejudicial to the respondent, *Sawyer v. United States* (1906) 202 U. S. 150. The Circuit Court of Appeals, in the eighth and first circuit, has held contrary to the principal case, on the ground that too great latitude is thus given to the jury, and too great a burden is put upon the defendant. *Balliet v. United States* (1904) 129 Fed. 689; *Myrick v. United States* (1915) 219 Fed. 1. The principal case proceeds upon the theory that a defendant cannot partially waive his constitutional privilege, and if he steps outside of the circle which the Constitution draws around him, he then subjects himself to the same rule as that applying to any other witness, and his silence may be the subject of comment and inferences drawn from it. This reasoning is generally followed in state jurisdictions. *State v. Ober* (1873) 52 N. H. 459; *Stover v. People* (1874) 56 N. Y. 315; *Cotton v. State* (1888) 87 Ala. 103. See Dunmore, Comment on Failure of Accused to Testify (1917) 26 YALE LAW JOURNAL, p. 464.

E. J. M.

EVIDENCE—EXPERT OPINION—FOUNDATION.—MALONE-MCCONNELL REAL ESTATE CO. V. SIMPSON AUDIT CO. (1916) 73 So. (ALA.) 369.—An accountant, conceded to be an expert, made a personal examination of the books of the defendant and of the audit of the same by the plaintiff, and stated that plaintiff's work was worthless, giving only some of the facts upon which his conclusion was based. *Held,* that the opinion of the accountant was rightly admitted.

The authorities are not uniform as to whether the opinion of an expert who has had the opportunity of examination is admissible, if he does not first give in detail the facts from which he has drawn his conclusion. Probably the weight of authority is that such testimony is inadmissible. *Raub v. Carpenter* (1902) 187 U. S. 159; *Sauntman v. Maxwell* (1900) 154 Ind. 114; *Scott v. Hay* (1903) 90 Minn. 304; *State v. Simonis* (1901) 39 Or. 111; *Kinney v. Brotherhood of American Yeomen* (1905) 15 N. D. 21; *Flanagan v. State* (1898) 106 Ga. 109. These courts say that the expert must first state the facts, so that the jury may judge whether the facts as well as the opinion are correct, and other experts may express an opinion on these facts. They say that it is the conclusion from the facts in evidence, not the general opinion of the expert, which is of interest to the jury. Where the facts are voluminous, complicated and difficult, some courts have admitted an opinion without a detailed state-

ment. *Charlotte v. Atlantic Bitulithic Co.* (1915) 228 Fed. 456; *Schaefer & Co. v. Ely* (1911) 84 Conn. 501. Professor Wigmore maintains that the rule requiring the facts to be stated first is based on a misconception of the meaning of "opinion." Originally the term was applied only to guesswork and not intended to hinder or exclude a statement formed from personal examination. It is sufficient to ask the expert if he has made an actual examination, and then permit him to state his opinion. This rule would remove burdensome details, and would work no injustice to the opposing party, as every fact even to the smallest detail could be brought out on cross-examination. Wigmore, *Evidence,* secs. 675, 1922. This view has been adopted in several comparatively recent cases. *People v. Faber* (1910) 199 N. Y. 256; *State v. Ross* (1915) 178 S. W. (Mo.) 475; *Commonwealth v. Johnson* (1905) 188 Mass. 382. In the principal case some of the facts were already before the jury, but the language of the court is in entire accord with the latter doctrine. It is submitted that any change in the present cumbersome state of our law is exceedingly desirable.

J. E. H.

EVIDENCE—NON-EXPERT OPINION—ADMISSIBILITY.—STATE v. PRUETT (1916) 160 PAC. (N. M.) 362.—The defendant was indicted for murder. At the trial the state's witnesses testified over objection that they saw knee-prints adjacent to a cedar bush near the scene of the homicide. One witness stated farther, that the knee-print he identified was at a normal distance from a toe-print of the left foot and opposite a ball-print of the right foot. *Held,* that the testimony was admissible.

Opinions of non-expert witnesses are admitted where, by the nature of the matter, an attempted description, because insufficient or vague, would leave the jury unable to form a judgment of its own. *Com. v. Sturtivant* (1875) 117 Mass. 122; *Evans v. People* (1858) 12 Mich. 35; *Bates v. Sharon* (1873) 45 Vt. 481. Under this recognized rule witnesses have been permitted to express opinions on the physical cause of a great variety of marks and imprints. The testimony may be as to what kind of object produced the mark in question, as for example, that overshoes left certain tracks found in the snow. *State v. Ward* (1888) 61 Vt. 153. Or it may go farther and indicate what particular one of a class made the impressions observed. Accordingly, the opinion that certain foot-prints were left by a particular pair of shoes worn by the defendant has been admitted. *State v. Reitz* (1880) 83 N. C. 636. Similarly, the statement that the wagon-track and hoof-prints about the scene of a theft were the same as those seen by the witness elsewhere was admitted. *Williams v. State* (1916) 182 S. W. (Tex.) 335. A stricter application is found, however, in some states which permit only a description of the several tracks, barring opinion thereon. *Terry v. State* (1898) 23 So. (Ala.) 776; *State v. Green* (1893) 40 S. C. 328, 330. The broader rule, admitting opinion, has been applied to testimony involving other varieties of marks, seemingly less characteristic. In a homicide case, the witness, having seen a depression in a bed, stated that in his opinion it was made